International Union of Operating Engineers

AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

January 28, 2019

VIA E-MAIL- Regulations@nlrb.gov

Roxanne Rothschild
Acting Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001

RE: Comments Regarding NLRB's Notice of Proposed Rulemaking Defining the Standard for Determining Joint-Employer Status, RIN 3142-AA13

Dear Ms. Rothschild and Members of the Board:

The International Union of Operating Engineers (IUOE) submits these comments on the National Labor Relations Board's Notice of Proposed Rulemaking (NPRM) regarding the standard for determining joint employer status. The IUOE is a progressive, diversified trade union that primarily represents operating engineers, who work as heavy equipment operators, mechanics, and surveyors in the construction industry, and stationary engineers, who work in operations and maintenance in building and industrial complexes, and in the service industries. The IUOE also represents nurses and other health industry workers, a significant number of public employees engaged in a wide variety of occupations, as well as a number of job classifications in the petrochemical industry. Founded in 1896, the IUOE today has approximately 400,000 members in 112 local unions throughout the United States and Canada, and is the 10th largest union in the AFL-CIO.

The IUOE's interest in the joint employer standard stems from its representation of workers in the evolving modern workplace, where frequently more than one entity codetermines the wages and working conditions of employees. Its interest also arises from its active attempts to organize non-union workers in that same evolving workplace, and the difficulties entailed in assuring genuine protections for workers when all of the relevant entities are not at the bargaining table. As a major construction industry union, the IUOE has substantial experience with multi-employer and multi-union collective bargaining in the construction industry, as well as with the administration of multi-employer benefit funds, and believes that experience is relevant to allaying certain expressed fears about complications allegedly inherent in having multiple parties involved in bargaining. And, as an active participant in the NLRB's healthcare bargaining unit rulemaking proceeding, the IUOE also has insights from that experience that it wishes to bring to the Board's attention.

Summary of Comments. First, the IUOE opposes the choice of rulemaking over adjudication to determine the joint employer standard. The joint employer inquiry is necessarily fact intensive, and the economies and efficiencies ordinarily achieved through rule-making are not present here, where the Board simply seeks to substitute one multi-factor test for another.

Moreover, the *Browning-Ferris*[1] decision was the first occasion on which the Board thoroughly explained the basis for its joint employer standard and placed it appropriately in the common law framework. The Board has had very little experience under the *Browning-Ferris* standard, and now, in its opinion reviewing that standard, the federal Court of Appeals for the District of Columbia Circuit has "affirm[ed]the Board's articulation of the joint-employer test as including consideration of an employer's reserved right to control and its indirect control over employees' terms and conditions of employment"[2]—conclusions directly contrary to the view on both issues taken in the NPRM—and remanded the case to the Board for further articulation of what aspects of indirect control it will find relevant. Under these circumstances, the prudent course would be for the Board to accept the remand of *Browning-Ferris* and take into account what the DC Circuit says the common law requires rather than pursue a rule adopting a rejected view of such requirements, for:

> The policy expertise that the Board brings to bear on applying the National Labor Relations Act to joint employers is bounded by the common-law's definition of a joint employer. The Board's rulemaking, in other words, must color within the common-law lines identified by the judiciary.

Browning-Ferris Industries of California Inc., d/b/a BFI Newby Island Recycling, No. 16-1028, (D.C. Cir. December 28, 2018), sl. op. at 21.

Additionally, the justifications the Board has previously advanced for substantive rulemaking are absent here, necessarily giving rise to the inference that the real reason for proceeding via rulemaking is an effort to avoid the ethical dilemma arising from case-by-case adjudication of the joint employer issue in the post *Hy-Brand*[3] context. Finally, the Board's two prior major rulemaking efforts included public hearings, at which workers, unions, and employers got a chance to testify and challenge aspects of the Board's proposed rule, resulting in each instance in the Board being convinced to make substantial changes from the proposed rule

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[1] *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015)

[2] *Browning-Ferris Industries of California, Inc. v. NLRB,* No. 16-1028 (D.C. Cir. December 28, 2018), sl. op. at 4.

[3] *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (2017), vacated 366 NLRB No. 26 (2018).

to the final one. Here, the Board has unwisely rejected requests for public hearings, reinforcing the impression that it is not genuinely interested in an open-minded look at this complicated question, but rather is engaging in the minimum due process that it hopes will survive judicial scrutiny as it rushes to a pre-ordained result. The IUOE hereby renews the request it previously made in conjunction with the AFL-CIO and other unions for the Board to hold public hearings if it decides to proceed with the proposed rule.

Second, on the substance of the proposed rule, the rule ignores the common law "right to control" test in favor of a demonstrated, immediate, direct, substantial, not-routine-and-not-limited control test the only purpose for which seems to be to assure large corporate entities that contract out work, engage temporary workers, or franchise their brand that they will never be held responsible as "joint employers" for their conduct. The rule, if it is to be consistent with the common law as articulated by the DC Circuit and provide certainty to employers, employees, and unions, must include as a relevant factor reserved, unexercised control of terms and conditions of employment. Otherwise, an entity whose contractual relationships grant it the power to control workers' lives will not be considered an employer when that power is held in reserve, only to become a joint employer when it chooses to exercise that authority—a change of status mid-stream that does nothing to promote stability or predictability in business relationships. And, the exercise of "routine'—i.e., regular, repetitive—control over terms and conditions of employment must be included as a relevant factor in the joint employer determination as well.

Third, the NPRM justification is focused inordinately on the concerns of employers, while leaving employee rights and the Board's statutory mandate to promote the practice and procedure of collective bargaining as side-bar considerations treated dismissively if at all. To the extent that employer concerns are the central focus, the Board has ignored the interests of small employers, who will be left solely holding the bag for liabilities that in many instances should be joint and several, and will be stuck at the bargaining table trying to negotiate over terms and conditions of employment of which they are not the sole determiner. The putative joint employers, who will be left as non-employers under the NPRM's proposed rule, may also find that the law of unintended consequences will result in their inability to successfully assert workers compensation coverage for injuries to their "non-employees," thereby subjecting them to tort suits as third parties when one of their "non-employees" is injured on the job.

Fourth, experience with sophisticated business enterprises, with multi-employer, multi-union bargaining, and with multi-employer benefit funds demonstrates that concerns about the ability to accommodate more than one employer's interests in collective bargaining are overblown and unfounded, one of an army of straw man arguments the *Browning-Ferris* dissenters and the business trade association propaganda machine have deployed in a feint to distract from the

actual, unremarkable holding in *Browning-Ferris* and its actual, relatively minimal impact. Finally, *Browning-Ferris* is not contrary to the Supreme Court's decision *Denver Building Trades*[4] and the rule proposed in the NPRM is not supported by that case.

The Board's Joint-Employer Standard Is Not A Proper Subject For Rulemaking. The IUOE agrees that, as a general matter, Section 6, 29 U.S.C. § 156, of the National Labor Relations Act gives the Board broad rulemaking authority to adopt "such rules and regulations as may be necessary to carry out the provisions of the Act." The IUOE disagrees with the Board's position that the adoption of the proposed joint employer standard via rulemaking is "necessary to carry out the provisions of the Act" under the circumstances present here.

As the Board acknowledges in the NPRM, 83 Federal Register at p. 46686, the Supreme Court has stated that: "[T]he choice between rulemaking and adjudication lies in the first instance within the Board's discretion." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974). As the Board details in the NPRM "Background" Section's description of the evolution of joint employer doctrine, Fed. Reg. at 46682-46685, for its entire history the Board has uniformly exercised this discretion to decide joint employer cases through case-by-case adjudication. To reiterate, without regard to whether the majority of the Board Members was Democratic or Republican, joint employer issues were historically decided exclusively through adjudication.

This uniform use of adjudication on joint employer issues is in line with the Board's historic preference for adjudication over rulemaking. Since 1935, the Board has adopted, modified, and reversed all of its numerous rules of law through case-by-case adjudication with only two major exceptions, both in the representation case context: the healthcare bargaining unit rulemaking and the representation case procedure rulemaking. This steadfast adherence to case-by-case adjudication has come despite considerable scholarly and judicial urging to utilize the Board's rulemaking authority under § 6, see 284 NLRB 1519-1520. Nevertheless, the Board has persisted in its almost exclusive use of case-by-case adjudication. Given this line of Board precedent favoring adjudication over rulemaking for the adoption of rules of general application, the Board needs to explain why in this instance it has chosen rulemaking, particularly where, just 10 months before the promulgation of the NPRM, the Board sought to change the joint employer standard through adjudication in a particular case.

The reasons relied upon for the Board's prior use of rulemaking do not support its exercise here. In the health care bargaining unit rule context, the Board faced new jurisdiction granted by Congress in the 1974 Health Care Amendments to the NLRA, and that legislation's committee reports that warned against "undue" proliferation of bargaining units. Each of the Board's attempts to formulate a

[4] *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675 (1951).

standard that took into account the Congressional admonition against proliferation failed in the Courts of Appeal. Frustrated with these failures and the appellate criticism that accompanied them, the Board sought to place its standard on a solid empirical basis, and conducted extensive hearings on its original proposal, modified the proposal in an interim rule, and ultimately adopted its final rule. The health care rulemaking was thus motivated by failure in the Courts of Appeal,[5] not an issue here, where the recently adopted *Browning-Ferris* standard has been approved by the DC Circuit, and prior NLRB joint-employer determinations have generally been met with favorable appellate rulings.[6]

The representation case procedures rule was motivated by a need to update and streamline the Board's entire representation election process, a process which involves numerous interlocking rules of law and procedure. See, generally 79 Fed. Reg. 74308; Memorandum GC 15-06. No single case would allow the opportunity to engage in a comprehensive update, and therefore the Board's undertaking could not have been accomplished through any one case; rather, case-by-case adjudication in this context would have resulted in piecemeal adoption of certain changes, while others would languish awaiting the appropriate case raising the relevant issue. No such complicated interweaving of multiple interlocking parts is present here; rather, there is a discrete issue that is governed by a common law rule and has historically been resolved successfully through case-by-case adjudication.

With neither of the types of factors that had previously led the Board to exercise its rarely utilized rulemaking authority present, we turn to the Board's stated justifications for rulemaking in this instance. Respectfully, the three reasons proffered in the NPRM don't hold water.

First, the Board points to its own "recent oscillation on the joint employer standard," the fact that joint employer questions may arise in a variety of business relationships, and that joint employer determinations may have wide-ranging import for the affected parties as reasons that the Board needs wider, public

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[5] The health care rulemaking also was the first occasion to observe what has become the iron rule of Board rulemaking: no matter how many times the Board is urged, in the abstract, to make greater use of its rulemaking authority, as soon as it attempts to do so in a concrete instance, extreme dissatisfaction results and time-consuming, resource-draining litigation ensues. In the health care instance, the final rule was initially enjoined by the federal district court in Chicago, 718 F. Supp. 704 (1989), the Seventh Circuit reversed, 899 F. 2d 651 (7th Cir. 1990), and ultimately the Supreme Court upheld the rule in *American Hospital Association v. NLRB*, 499 U.S. 606 (1991), almost 4 years after the Board majority (Members Stephens, Babson, and Cracraft, with Chairman Dotson and Member Johansen dissenting) initially proposed the rule. Such a lengthy, resource-intensive effort may have been worthwhile when the Board had numerous health care representation cases backed up awaiting a court-approved standard, but it cannot be justified when the Board's case backlog is growing and, as the Board concedes in the NPRM at p. 46695, there are a "limited number of Board proceedings where joint employer status is alleged."

[6] See, for example, *NLRB v. Browning-Ferris Industries*, 691 F. 2d 1117 (3d. Cir. 1982); *NLRB v. Retro Environmental, Inc.*, No. 18-1245 (4th Cir. Sept. 19, 2018).

comment on the joint employer issue, not limited to briefs filed by parties and amici. While decrying the "recent oscillation," the Board further oscillates. Notably, the decried oscillation is solely attributable to the *Hy-Brand* contretemps, where the Board majority hijacked a case governed by a straight-forward single employer issue to engage in entirely unnecessary score-settling on the joint employer front. It is evident that all the Board is doing in the NPRM is to raise a variation of the *Hy-Brand* standard from the dead. Such legerdemain is likely to give additional life to the "flip-flop" critique of the Board, further damaging its already tarnished reputation in the Courts of Appeal, before interested parties, and with the public—if it now persists with the proposed rule in the face of the DC Circuit's decision in *Browning-Ferris* adverse reaction from that court is all too predictable. As the *Hy-Brand* decision was vacated and set aside a little over two months after its tortured issuance, it is entitled to the same lack of regard given the two-member Board decisions vacated after *New Process Steel*[7] and the recess-appointee decisions vacated after *Noel Canning*.[8]

With *Hy-Brand* set aside, with the *Browning-Ferris* standard now endorsed by the DC Circuit, with the joint employer issue turning on a common law question as to which the Board is entitled to no deference,[9] and given the resource-intensive nature of a rulemaking at a time when the Board has many other important matters before it, the prudent course would not be to further "oscillate" by picking the wrong side of the debate between the *Browning-Ferris* majority and dissent over what the common law requires, but rather to accept the *Browning-Ferris* remand from the court, withdraw or at least suspend the rulemaking process, and issue whatever guidance is necessary in the context of a decision on remand in *Browning-Ferris*.

Moreover, it is disingenuous for the Board to expect, in response to the NPRM, substantial additional comments from some aspect of the public over and above the numerous parties who filed amicus briefs in *Browning-Ferris*.[10] Those same parties and interests that weighed in on *Browning-Ferris* are the entities who will be generating or organizing the lion's share of the input the Board will receive in response to the NPRM. If those parties were given the opportunity to make presentations at a public hearing, subject to cross examination as were the witnesses at the health care rulemaking proceeding or to questioning from the Board Members as was the case in the representation case procedures rulemaking, relevant dialogue and information might result. Under the current procedure, the Board is likely to get a flock of trade association-generated identical submissions decrying

[7] *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010).

[8] *National Labor Relations Board v. Noel Canning*, 573 U.S. ___ (2014).

[9] See *Browning-Ferris Industries of California, Inc. v. NLRB*, No. 16-1028 (D.C. Cir. December 28, 2018), sl. op. at 17-21.

[10] The list of the many parties, including the Board's General Counsel, who filed or participated in amicus briefs in *Browning-Ferris* is found at footnote 3 of the Board's decision.

hypothetical woes visited by a caricature of the *Browning-Ferris* standard, not particularly helpful information on which the Board can base an informed decision.

Second, the Board indicates that the use of rulemaking allows the Board to clarify what it means in the proposed rule through the use of "examples" that will give the parties that come before the Agency greater certainty about what the rules are. Respectfully, the "examples" raise more questions than they answer, as we point out in greater detail later in these comments.[11] Suffice it to say, when a common law test requires the consideration of multiple factors—as the Supreme Court stated about the analogous determination of whether a worker is an employee or independent contractor: "In such a situation as this there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law principles." *NLRB v. United Insurance Co.*, 390 U.S. 254, 258 (1968)–the presence in a particular case of one or more additional factors (as will always be the case in real life) makes the example hypotheticals of marginal utility. And, for this reason, the Board is unable to use the examples to create genuine safe harbors on which parties can rely as an absolute defense to any unfair labor practice charge; instead the examples will result in futile efforts by the parties at the Regional investigative level to try to shoe-horn the facts in their case to appear closer to or further from one or more example contained in the rule, leading to arguments over that abstract proposition rather than the necessary focus on reviewing all the relevant common law factors.

And, third, the Board points to the difficulty of changing a rule adopted through rulemaking as a virtue for parties having to plan their affairs in reliance on the rule. This argument for a less flexible standard has an underlying premise—that this rigid, less susceptible-to-change rule will be one that is actually clear so that parties will be able to understand it and apply it to the multitude of situations that will arise. However, common law multi-factor tests requiring examination of all the facts and circumstances are inherently difficult to apply, without regard to whether the test is adopted in a rule or through case-by-case adjudication.[12] Given

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[11] The IUOE does not agree with many of the substantive points made by the NLRB General Counsel in the comments he filed on December 10, 2018. However, the IUOE does agree, albeit for different reasons, with his criticism that the NPRM's hypothetical examples are insufficient to provide useful guidance. See NLRB General Counsel's December 10, 2018 comments at pages 10-12.

[12] One example of this point is to compare the Internal Revenue Service's regulations adopting a twenty-factor test for determining independent contractor status (accompanied by a 123-page explanatory manual) with the Board's ten factor test for independent contractors derived from the Restatement (Second) of Agency § 220 and adopted through case-by-case adjudication—while there may be many who are dissatisfied with both tests and some may favor one over the other, it is doubtful that the means of adoption is the reason anyone favors the IRS test over the Board test.

this indisputable truth, and given the upsurge in contracting out, use of temporary employees, franchising, and the gig economy, the application of a common law joint employer test calls for more, not less flexibility to take into account ever-changing factors in our dynamic economy.[13] In this context, the greater difficulty of modifying a rule of general application adopted through rulemaking becomes a hindrance to responsive lawmaking and not a virtue.

For the Operating Engineers, these dynamics have resulted in greater contracting out of building systems maintenance and operation work, so that the stationary engineers operating the boiler and the other systems in today's commercial office buildings in many instances are on a contractor's payroll rather than the building owner's. Similarly, changes in the construction industry have brought to the fore the role of construction managers with responsibility previously delegated to general contractors, labor brokers as suppliers of even skilled construction workers, and payroll companies as the nominal "employers" of workers who labor entirely at the direction and control of entities other than the one that issues their checks. The IUOE raises these examples not to contend that they necessarily create joint employer relationships in every instance but rather to illustrate the dynamic nature of employment relationships in the American economy and to underscore the Board's need to be flexible in response to these workplace changes. The Board's obligation to protect employee rights and encourage the practice and procedure of collective bargaining is not served by the Board's ignoring the impact of these changes on employees' ability to successfully exercise those rights. Rather, considering all the relevant factors in each factual situation to determine whether the entity in question has a right to control terms and conditions of employment is the surest way for employees' rights to be protected and effectuated.

Given the manifest flaws in the Board's proffered justifications, there is a reason hiding in plain sight for the Board's choice of rulemaking over adjudication—the different ethical standards for recusal in rulemaking vs. those applicable in case-by-case adjudication. Others have raised this topic and addressed it thoroughly, so the IUOE will not belabor the point. However, we respectfully submit that Board Members need to ask themselves, in considering how to proceed, not merely whether the rulemaking path is allowable under the more lenient recusal standards for rulemaking but whether the determination of a joint employer standard is the type of matter that lends itself better to rulemaking than adjudication. As we have made clear above, the answer to this question is demonstrably "No." Under these circumstances, the appropriate response would

[13] Industry groups recognize the need for flexibility to adapt to changes in business relationships. Thus, the Preface to the Code of Ethics of the International Franchise Association (IFA) states: "The Code, like franchising, is dynamic and may be revised to reflect the most current developments in structuring and maintaining franchise relationships."https://www.franchise.org/mission-statementvisioncode-of-ethics (last visited January 1, 2019).

be for the Board to withdraw or suspend the processing of the NPRM, accept the DC Circuit's remand in *Browning-Ferris*, and take the court's opinion into account as it considers whether to modify the joint employer standard going forward.

The Proposed Rule Departs From the Common Law. The Board's Notice of Proposed Rulemaking (NPRM) sets forth the following proposed joint employer standard:

> An employer, as defined by Section 2(2) of the National Labor Relations Act (the Act), may be considered a joint employer of a separate employer's employees only if the two employers share or codetermine the employees essential terms and conditions of employment, such as hiring, firing, discipline, supervision and direction. A putative joint employer must possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited or routine.

NPRM, 83 Fed. Reg. at 46696-97. The majority then provides twelve (12) "examples" in the NPRM that purport to illustrate the application of the foregoing standard. *Id.* at 46697.

A majority of the Board members assert that the proposed regulation "is consistent with the common law of joint-employer relationships." NPRM, 83 Fed. Reg. at 46686. However, that assertion is unaccompanied by any convincing explanation of how the proposed rule conforms the common law.[14] Rather, the majority requests "comments regarding the state of the common law on joint employment relationships," positing questions such as "[d]oes the common law dictate the approach of the proposed rule or of *Browning Ferris*" and "[d]oes the common law leave room for either approach." *Id.* at 46687.

1. The United States Court of Appeals for the D.C. Circuit has provided the framework for answering these questions in *Browning-Ferris Industries of California, Inc. v. NLRB*, Case No. 16-1028, 2018 WL 6816542 (Dec. 28, 2018) ("*BFI of CA v. NLRB*"). The appellate court observed:

> … it is precisely because Congress has tasked the courts, and not the Board with defining the common–law scope of "employer" that this court accepts the Board's repeated request that we resolve this case

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[14] Ordinarily, the Board provides "little weight" to bald assertions made by parties in adjudicatory proceedings. *D.H. Farms Co.*, 206 NLRB 111, 113 (1973) (stating bald assertion, which was also self-serving, was entitled to "little weight"). Such assertions have no more weight when made by the Board in the context of regulatory proceedings. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ass'n*, 463 U.S. 29, 43 (1983) (stating agency must, in rulemaking, "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found the choice made" (internal quotation marks and citation omitted)).

> notwithstanding the pending rulemaking. The policy expertise that the Board brings to bear on applying the National Labor Relations Act to joint employers is bounded by the common-law's definition of a joint employer. The Board's rulemaking, in other words, must color within the common-law lines identified by the judiciary.

BFI of CA v. NLRB, Case No. 16-1028, slip op. at 21. The court provided those lines in its decision for the Board's benefit, explaining how the common law allows for the consideration of (1) authorized but unexercised forms of control and (2) indirect control over terms and conditions of employment when analyzing a potential joint employer relationship. *Id.* at 22-49.

Two points raised in the court's discussion merit special emphasis. First, the court noted the established recognition in the common law that the right of control is relevant to the analysis of the employer-employee relationship. *Id.* at 25-32. The court even cited to the Board's acknowledgment of that point in *Hy-Brand Industrial Contractors*, 365 NLRB No. 156 (Dec. 14 2017), vacated, 366 NLRB No. 26 (Feb. 26, 2018). *BFI of CA*, Case No. 16-1028, slip op. at 27-28. Second, the court observed that "common-law decisions have repeatedly recognized that indirect control over matters commonly determined by an employer can, *at a minimum*, be weighed in determining one's status as an employer or joint employer, especially insofar as indirect control means control exercised through an intermediary." *Id.* at 39 (emphasis added, internal quotation marks and citation omitted). The court then went a step further by remarking that "[a] categorical rule against even considering indirect control – no matter how extensively the would-be employer exercises determinative or heavily influential pressure and control over all of a worker's working conditions – would allow manipulated form to flout reality." *Id.* at 44.

Both of these points underscore the entirety of the lines demarking the common-law definition of an employer or joint employer. To be sure, as the D.C. Circuit found, the consideration of reserved control or indirect control cannot be open-ended. That is evident from the court's discussion of how the Board crossed over from working conditions to "routine components of a company-to-company contract." *BFI of CA*, Case No. 16-1028, slip op. at 47. By the same token, the court emphasized that the analysis of an employer or joint employer relationship should not ignore either reserved control or indirect control. *Id.* at 27-44.

2. Consequently, the Board failed to "color within the common-law lines identified by the judiciary" when it announced its proposed joint employer standard. The standard's requirement that "a putative joint employer must possess and *actually* exercise substantial *direct and immediate* control" over employees' working conditions (83 Fed. Reg. at 46686) amounts to little more than a "categorical rule" that drains reserved and/or indirect control of any relevance. As such, the standard presents the exact result that, in the view of the D.C. Circuit, places "the common law at war with common sense," thereby allowing

"manipulated form to flout reality." *Id.* at 44. Situations where a putative joint employer retains significant control, either reserved or indirect, over the employees' terms and conditions of employment would fall outside of the proposed joint employer standard. The putative joint employer would retain that control, imperiling the employees' ability to bargain collectively in a meaningful sense. Any agreement reached by the employees with the nominal employer could be upended at any time with the putative joint employer's exercise of the reserved or indirect control. The employees would be left without recourse or remedy, because, *as a result of the Board's proposed rule*, the putative joint employer was able to arrange its affairs in such a manner that allowed it to circumvent the rights available to employees and the responsibilities placed upon employers by the National Labor Relations Act.

Section 1 of the Act declares that it is the national policy to "encourage[e] the practice and procedure of collective bargaining and [to] protect[ ] the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 151. By effectively excluding reserved and indirect control from the joint employer analysis, the Board's proposed rule not only would allow employers to "flout reality," but it would considerably weaken the eighty-four (84) year old foundation of U.S. labor law.[15]

3. By contrast, the Board's approach in *Browning-Ferris of California*, 362 NLRB No. 186 (Aug. 27, 2015) represents an effort to shore-up that foundation by ensuring that the Act is reasonably interpreted and applied in the context of a changing workplace. The Board achieves this objective by restoring the common-law moorings to the joint employer standard.

A brief history of the Board's joint employer analysis demonstrates the foregoing conclusion. Generally, the Board's joint employer standard originated with *Greyhound Corp.*, 153 NLRB 1488 (1965), *enf'd*, 368 F.2d 778 (5th Cir. 1966). In that case, the Board found "that the evidence cogently demonstrates that" Greyhound Corporation and Floors, Inc. "share, or codetermine those matters governing essential terms and conditions of employment of porters, janitors and maids herein in such a manner as to support our finding that their status is that of joint employers." *Greyhound Corp.*, 153 NLRB at 1495. The Board added, "[i]t is

[15] In this regard, the suggestion offered by the current General Counsel of the National Labor Relations Board in his comments – *viz.*, "for an entity to be deemed a joint employer subject to a bargaining obligation or for vicarious liability for a co-employer's violation of a bargaining obligation, that entity must control all of the listed essential terms and conditions of employment," Letter from General Counsel Peter Robb to the Members of the Board, at 9 (Dec. 10, 2018) – invites even greater manipulations of form to flout reality and even greater weakening of the Act's purposes to promote and protect collective bargaining.

clear from the circumstances of this case that, whatever Floors' status as an independent contractor with Greyhound, Greyhound has reserved to itself, *both as a matter of contractual agreement and in actual practice*, rights over these employees which are consistent with its status as their employer along with Floors." *Id.* (emphasis added). The Board based this conclusion on the following:

> the nature of service agreements which bestow upon Greyhound the right to (1) establish work schedules, and assign employees to perform the work; (2) specify the exact manner and means through which the work will be accomplished and issue orders and instructions to that effect, especially when Floors' supervisors are absent from Greyhound premises; and (3) control straight-time wage rates and overtime hours and pay rates in accord with the fixed costs, percentages, and total amounts due to Floors for weekly and annual periods, as set forth in the Agreements.

Id. at 1495-96. The Board also relied upon:

> The role of porters (who comprise the largest group in the unit) as integral parts of Greyhound's transportation enterprise, and their use of Greyhound's equipment and supplies in their work performance, and, finally, the fact that in the course of their duties the porters are given detailed supervision by other Greyhound personnel.

Id. at 1496. Thus, the Board's analysis in *Greyhound Corp.* focused not only on actual control ("actual practice"), but also indirect and reserved control ("contractual agreement").

As explained in *Browning-Ferris*, the joint employer standard "is best understood as always having incorporated the common-law concept of control …." 362 NLRB No. 186, slip op. at 12. As the Board elucidated therein:

> Under common-law principles, the right to control is probative of an employment relationship – whether or not that right is exercised. Sections 2(2) and 220(l) of the *Restatement (Second) of Agency* makes this plain, in referring to a master as someone who "controls or has the *right to control"* another and to a servant as "subject to the [employer's] control *or right to control*" (emphasis added). In setting forth the test for distinguishing between employees and independent contractors, *Restatement (Second)* Section 220(2), considers (among other factors) the "extent of control which, *by the agreement*, the master *may* exercise over the details of the work" (emphasis added).

Id. at 13. These principles are clearly reflected in *Greyhound Corp.*, and, Board case law from 1965 to 1984 reflected the common law standards.

In 1984, the Board issued its decisions in *Laerco Transp.*, 269 NLRB 324 (1984) and *TLI, Inc.*, 271 NLRB 798 (1984). These decisions marked a departure (without explanation) from the longstanding, common law standard that originated in *Greyhound Corp.* The departure was two fold. *See, generally, Browning Ferris of Cal.*, 362 NLRB No. 186, slip op. at 10 (discussing departure from joint employer standard that began in 1984 and continued thereafter). First, the Board began to overlook evidence of reserved control and indirect control as evidence of joint employer status. *TLI, Inc.*, 271 NLRB at 798-99. Second, the Board began to discount evidence of the putative employer's supervision and direction of employees that was "limited and routine." *TLI, Inc.*, 271 NLRB at 799. *See also Laerco Transp.*, 269 NLRB 324, 326 (1984). These departures led to an indisputable narrowing of the joint employer standard without the benefit of any explicit modification of the earlier *Greyhound* standard.

The Board understood that this narrow standard – as laid out in *TLI, Inc.* and *Laerco Transp.* – is *not* the common law standard. This understanding is clearly evident in *Chesapeake Foods, Inc.*, 287 NLRB 405 (1987). In that case, an Administrative Law Judge (ALJ) applied the "common law 'right to control' test…." *Id.* at 406, 412. The ALJ found that the putative joint employer, Chesapeake Foods, exercised substantial, albeit indirect, control over the employees of its contractor. This indirect control included control over the employees' compensation, which the putative joint employer exercised through its setting the price paid to the contractor. It also encompassed control over discipline of the employees, which Chesapeake could exercise by virtue of its ability to terminate the contractor at will. Rather than arguing that the ALJ misapplied the common law standard, the Board held that the ALJ "applied an incorrect test for determining the Respondent's alleged joint employer status." *Id.* at 407. The correct test, in the Board's view, was set forth in *TLI, Inc.* Applying that more restrictive test, the Board concluded that Chesapeake Foods was *not* a joint employer because there was no evidence of its direct and immediate control exercised over the employees' terms and conditions of employment.

Thus, by the time the Board issued *Airborne Express*, 338 NLRB 597 (2002), the departure from the common law standard had been completed. A majority of Board members explicitly acknowledged that, "approximately twenty years ago, the Board, with court approval, abandoned its previous test in this area, which focused on a putative employer's indirect control over matters relating to the employment relationship." *Id.* at 597, n.2. The Board completed that departure when the majority added, citing *TLI, Inc.*, "[t]he essential element in this analysis is whether a putative joint employer's control over employment matters is direct and immediate." *Airborne Express*, 338 NLRB at 597, n.2.

Over the succeeding years, the cases demonstrate that for a joint employment relationship to be found, the putative joint employer must not only "share or co-determine" essential terms and conditions of employment, it must also

"meaningfully affect" those matters, *i.e.*, exercise direct and immediate control over "matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction."

When the Board issued *Browning-Ferris of Cal.* in 2015, it announced a revised joint employer standard, explaining how that revised standard would return the joint employer analysis to its common law core. *Browning-Ferris of Cal.*, 362 NLRB No. 186, slip op. at 11-17. The Board specifically explained how the common law principles included evidence of reserved control or indirect control, tying its analysis specifically to the sources from which those principles are derived, such as the *Restatement (Second) of Agency*. *Id.* at 12-13. The Board also explained why the exercise of supervision and direction, even if limited and routine, is still relevant to the joint employer analysis under the common law. *Browning-Ferris of Cal.*, *supra*, slip op. at 14. Those common law principles provide the "outer limits of a permissible joint-employer standard." *Id.* at 15.

Thus, the IUOE respectfully submits that answers to the questions presented by the Board in the NPRM (83 Fed. Reg. at 46687) are: (1) the common law allows for the flexible, inclusive approach in *Browning-Ferris of Cal.*; and, as the D.C. Circuit's decision in *BFI of CA v. NLRB* illustrates, (2) the common law leaves no room for the Board's proposed standard in the NPRM. The common law expressly contemplates the consideration of all of the facts and circumstances surrounding an alleged joint employer relationship, including the exercise of indirect control and/or the reservation of control, as well as control that may otherwise be viewed as "limited and routine." In other words, the approach set forth in *Browning-Ferris of Cal.* is the only standard faithful to the common law by which the Board should analyze joint employer relationships.

4. Not only is the proposed regulation incompatible with the common law, but the majority's rationale for the regulation is inconsistent with the policies embodied in Section 1 of the National Labor Relations Act, 29 U.S.C. § 151, and common sense. The majority's rationale is reflected in its "preliminary" views and beliefs, which are "subject to potential revision in response to comments." These views and beliefs are two-fold: (1) "the Act's purposes of promoting collective bargaining and minimizing strife are best served by a joint employer standard that imposes obligations on putative joint employers that have actually played an active role in establishing essential terms and conditions of employment"; and (2) "absent a requirement of proof of some 'direct and immediate' control to find a joint employer relationship, it will be extremely difficult for the Board to accurately police the line between independent commercial contractors and genuine joint employers." NPRM, 83 Fed. Reg. at 46686.

First, it is unclear how the twin purposes of "promoting collective bargaining and minimizing strife" are served in any fashion by insulating employers who have reserved control for themselves or who have indirect control over the

terms and conditions of employment of workers who are nominally employed by a separate employer. For instance, Example 10 in the NPRM provides:

> Business contract between Company and a Contractor reserves a right to Company to discipline the Contractor's employees for misconduct or poor performance. Company has never actually exercised its authority under this provision. Company has not exercised direct and immediate control over the Contractor's employees' terms and conditions of employment.

NPRM, 83 Fed. Reg. at 46697. Example 10 would result in a finding under the proposed standard that the Company is not a joint employer of the Contractor's employees. However, once the Company exercises that authority, what happens to the relationship? [16] If the Company exercises it once with respect to a Contractor employee engaging in "severe sexual harassment," then it would not be a joint employer under Example 12. If the Company exercises it with "some frequency" about employees engaged in far less serious issues (misconduct or poor work performance), causing the Contractor to impose discipline upon those employees, then the Company may be a joint employer under Example 11. These examples, along with the rest in the NPRM, only underscore the point that the proposed regulation does not promote either collective bargaining or minimize strife, they perpetuate the uncertainty over when an employer becomes a joint employer. The only difference is that uncertainty is no longer the product of Board decisions, it is the result of a Board regulation.

Second, the Board's stated need to "accurately police the line between independent commercial contractors and genuine joint employers," is a red herring. First, the majority cites no evidence that would even tend to show that the Board has any difficulty in adjudicating cases involving joint employers.[17] Setting aside the issues over how the joint employer standard may have evolved, the Board's administrative law judges and the Board have shown themselves to be adept at analyzing employer control over terms and conditions of employment. In any event, the Board does not have a statutory duty to "police" any "line" between any

[16] For example, what if, during a cold winter, the heat in the Company's building failed, the Contractor's employees complained to the Company about working in the cold, the Company failed to fix the heat, the Contractor's employees consequently walked off the job, and the Company, characterizing the walk-off as "misconduct," used its until-then-unexercised authority to discipline employees for misconduct to fire the employees for their clearly protected activity, see *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962). Would the Company suddenly transform from a non-employer to a joint employer once it exercised the previously unexercised reserved authority to discipline?

[17] The absence of empirical evidence is troubling in of itself. Indeed, the Act's prohibition barring the hiring of an economist to assemble and analyze date makes it incumbent on those advocating for the proposed rule to fill the analytical void. That was not done in the NPRM. Apart from the collection of comments, there does not appear to be any further effort by the Board to gather that evidence. This is reason enough to eschew rulemaking with respect to this subject.

employers. The manner by which employers may arrange their affairs is a matter that is left to the employers. As noted above, Section 1 of the Act, 29 U.S.C. § 151, defines the Board's responsibility to protect collective bargaining. Nowhere does the Act impose any obligation with respect to the negotiation of contracts or the association of employers with respect to their employees.

5. Not only is the NPRM out of step with the common law in its jettisoning of reserved control, its minimizing of "routine" control in the joint employer analysis is baffling. Routine means regular and repeated. If an entity has regular and repeated control of terms and conditions of employment, that entity at the very least "codetermines" those terms and conditions; indeed, regular and repeated control establishes that a party "actively participate[s] in decisions establishing unit employees' wages, benefits and other terms and conditions of employment." See NPRM, 83 Fed. Reg. at 46687.

In most workplaces, workers' work lives are largely controlled by a series of daily, "routine," regular, repeated decisions made by their front-line supervisors. As a simple example, in a supplier employer/user employer situation where a temporary agency supplies perma-temps to an industrial workplace, the "routine" mandating of overtime on a regular basis for supplied employees may be considered by some a minor aspect of the authority of the user entity's front-line supervisors. However, in today's workplace, where people hold multiple jobs, spouses are frequently both working, commuting distances are often great, and child and elder care responsibilities paramount, there are few more disruptive or more essential determinations than whether a worker has to work longer hours on a particular day than he or she planned. In this factual context, a union representative seeking to bargain voluntary overtime provisions, set schedules, the equitable rotation of overtime, or advance notice of schedule changes is on a fool's errand if she is limited to seeking such provisions from the supplier employer.

Similarly, drug tests may be routinely and regularly administered by the user employer for anyone having access to its facility to work. If the union representative wants to negotiate a proper drug testing protocol including the disciplinary consequences for positive tests and time periods after which a subsequent negative test will allow renewed access to the premises, the union representative simply cannot do that by talking to the supplier employer. Or, if the user employer engages in systematic, daily, routinized discrimination with respect to work assignments, favoring one race or sex over the other for choice tasks on a regular basis, grievances challenging this discrimination are utterly useless if filed with the supplier employer. Likewise, one employer may routinely shield from effective scrutiny sexual or racial harassment regularly engaged in by its supervisors against the employees of another employer working on the first employer's premises. As these examples make clear, routine, regular, repetitive

determination of terms and conditions of employment must be considered if collective bargaining is to be effective.

If the Board is truly committed to promoting collective bargaining and minimizing strife, as well as ensuring consistent decision-making, then it must adopt a joint employer standard that is truly rooted in the common law and takes into account both reserved and routine authority to codetermine terms and conditions of employment.

The Board should make clear what terms and conditions of employment are "essential." The rule proposed in the NPRM appears to provide not a comprehensive list of what the Board considers to be "essential terms and conditions of employment" but rather illustrative examples: "essential terms and conditions of employment **such as** hiring, firing, discipline, supervision, and direction." (Emphasis supplied). The explanation for the proposed rule, at 46686, uses the same formulation; then, in the next paragraph, it refers to "setting unit employees' wages, benefits, and other essential terms and conditions of employment" and, at 46687, it again refers to "decisions establishing unit employees' wages, benefits, and other essential terms and conditions of employment." So, it appears from these statements that the Board at least considers wages, benefits, hiring, firing, discipline, supervision, and direction as "essential." What remains unclear is what else is essential, and whether the Board means to use "essential" as a synonym for the more familiar "mandatory" terms and conditions of employment.

The IUOE suggests that it would be very helpful to employees, unions, and employers for the Board to provide a more comprehensive list of, or at least a thorough explanation describing the characteristics of, what it considers "essential" terms and conditions of employment. In particular, it would make sense to adopt the Board's jurisprudence on mandatory subjects of bargaining to describe such essential terms, because that would fit this subject into a framework with which practitioners are familiar.

Finally, and without slighting the importance of any other mandatory subject, safety and training issues are front and center bargaining concerns of the IUOE, as heavy equipment operators on construction sites are operating large, expensive, and potentially very dangerous machinery, and stationary engineers face the devastating consequences of boiler explosions, while both sets of workers are frequently exposed to hazardous wastes or materials, as are the health care workers who are members of JNESO, IUOE District Council 1. Thus, the IUOE strongly supports characterizing safety and training issues as essential terms and conditions of employment, and urges the Board to include them in a more comprehensive list of such essential terms.

<u>The expressed concerns about bargaining instability engendered by too many entities with differing interests having bargaining obligations is overblown.</u> The NPRM notes the *Browning-Ferris* dissenters' contention that the majority's test would actually foster substantial bargaining instability by requiring the "nonconsensual" presence of too many entities with diverse and conflicting interests on the employer side. NPRM at 46685. The management bar, and the NLRB General Counsel in his December 10, 2018 comments, have picked up on the dissenters' view, and the alleged complications arising from having more than one entity on the employer side of the table is regularly cited as a defect of the *Browning-Ferris* standard.

In the IUOE's view, this concern is misplaced. First, working out a bargaining strategy between two joint employers is a consequence of a joint employer determination under any joint employer standard—it is completely unclear why the dissenters believed two employers who each directly controlled particular aspects of essential terms and conditions of employment would be able to harmoniously engage in joint bargaining, but two employers where one's involvement in the determination of terms and conditions was routine or reserved would necessarily have less ability to act together.

Second, experience with multi-employer bargaining in the construction, trucking, longshore, printing, garment, and other industries demonstrates that many separate competitor employers, with no joint engagement to give them a common interest, are nonetheless routinely capable of working together to achieve a collective bargaining agreement.[18] In some multi-employer bargaining, the employers designate an agent, such as an employer association or lawyer, to act as their representative for bargaining—a path open to joint employers who could easily jointly designate an attorney or labor relations consultant to act for them. Often the designated bargaining agent works with a bargaining committee made up of several employers, who must necessarily meld their own separate interests to come up with a common bargaining position.

As but one example of thousands, the IUOE has, since the late 1940s, been one of four International Unions (the others are the Laborers International Union, the United Association of Plumbers and Pipefitters, and the International Brotherhood of Teamsters) that has bargained a National Pipe Line Agreement with the Pipe Line Contractors Association (PLCA) covering the construction of oil and gas main line pipelines throughout the country. The PLCA is an employer

[18] Multi-employer bargaining long antedated the Wagner Act. Congress considered legislation to limit or outlaw multiemployer bargaining during the Taft Hartley debates. These proposals failed. Reviewing the failed attempt to alter or restrict multi-employer bargaining, the Supreme Court observed that: "[These proposals] met with a storm of protest that their adoption would tend to weaken and not strengthen the process of collective bargaining and conflict with the national labor policy of promoting industrial peace through effective collective bargaining." *NLRB v. Truck Drivers Local 449 (Buffalo Linen Supply Co.)*, 353 U.S. 87, 94-95 (1957).

association made up of approximately 100 construction contractors engaged in pipeline construction work; it negotiates and administers the national agreements. Historically, the PLCA has been represented by the Akin, Gump law firm and an Akin, Gump lawyer has served as the PLCA's Managing Director. In negotiations, the PLCA is represented by a bargaining committee composed of representatives of a number of the PLCA member contractors, as well as the Managing Director; the IUOE's bargaining committee typically consists of a number of the business managers of Local Unions with significant pipeline work, along with the IUOE Pipeline Representative. While negotiating sessions are not always easy and occasionally differences among the members of the employer bargaining committee surface at the bargaining table, ultimately collective bargaining agreements have been reached and strikes and work disruptions are the extremely rare exception.

Similarly, multi-employer, jointly trusteed, labor-management health and welfare and pension funds (so-called Taft-Hartley funds), governed by 29 U.S.C. § 186(c) (5), are the norm in the unionized construction industry, and are present in many other industries as well. Such funds are statutorily required to have employers and employees equally represented in their administration. Both union- and management-appointed trustees are legally required to take off their collective bargaining hats when they are serving on such funds.[19] In the IUOE's experience, management-appointed trustees are from varying backgrounds and different companies with different interests, but they generally are able to come together to make joint decisions in the best interest of the participants and beneficiaries of the fund.

For example, United States IUOE Local Unions participate in the administration of 36 jointly trusteed pension funds. The largest of these is the Central Pension Fund (CPF) of the IUOE and Participating Employers, with 195,000 active participants and benefit recipients, more than 6,200 contributing employers, and $17.7 billion in assets as of the end of November 2018. The current management trustees include a construction industry trade association executive (now retired), an executive from a large mid-western construction company, an executive from a national building services contractor, and the Managing Director of the Pipe Line Contractors Association. Prior management trustees have included an executive from a mid-western trucking company, and the director of labor relations for a world-wide hotel chain. Despite their varying backgrounds, and the differing interest of the employers for whom they work, these management trustees

[19] See *NLRB v. Amax Coal Co.*, 453 U.S. 322, 334 (1981)("The language and legislative history of § 302(c (5) and ERISA therefore demonstrate that an employee benefit fund trustee is a fiduciary whose duty to the trust beneficiaries must overcome any loyalty to the interest of the party that appointed him.").

have always managed to come to common positions and have acted in the best interests of the CPF participants.[20]

These examples demonstrate that, in the labor relations context, employers with widely varying interests are capable of working with other employers to come to a joint position—there is nothing intrinsic to joint employer bargaining that should lead the Board to expect a different result there. Moreover, the argument that joint employer bargaining is just too complicated for businesses to figure out implicitly suggests that there are no other circumstances in the operation of a modern business where multiple parties with varying interests must sit down and hash things out—that all business operations involve straight forward, one-on-one negotiations. This is an extremely simplistic portrayal of how modern businesses operate. Companies must deal with multiple suppliers, multiple customers, must compete with others for bids, often engage in joint ventures, merge into or acquire other businesses, reorganize in bankruptcy, and engage in a myriad of other complicated transactions frequently involving more than one party. The notion that successful businesses are sufficiently sophisticated to navigate these various arrangements but their business acumen and negotiating skills will suddenly abandon them when faced with joint employer bargaining strains credulity.

Additionally, the *Browning-Ferris* dissenters' use of "nonconsensual" to characterize joint employer relationships is a complete misuse of the term. First of all, as *Browning-Ferris* itself demonstrates, the joint employer bargaining relationship will be established when a) a union petitions to represent employees and names both employers as joint employers, and b) after a hearing at which the Board determines that there are sufficient facts present to warrant a joint employer determination. The Board's determination will be based on the components of the business relationship between the two parties on which the parties have voluntarily agreed. Moreover, a joint employer bargaining obligation found where the putative joint employer has substantial, direct, and immediate control over essential employee terms and conditions of employment is no more or less "consensual" than one where the putative joint employer has a "right to control" those terms and conditions. The argument about imposing a "nonconsensual" obligation is a red herring.

No one is forcing the two entities to enter into the relationship vis a vis their employees that creates joint employer liability—everything about the relationship is consensual between the two as they determine which entity will have the right to control which aspects of the employees' terms and conditions of employment. Parties don't generally "agree" to assume joint and several liability—such liability arises out of the aspects of their joint relationship that they have mutually determined, usually through a contract, but occasionally through a combination of

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[20] See generally Teresa Ghilarducci, Garth Mangum, Jeffrey S. Peterson, and Peter Philips, <u>Portable Pension Plans for Casual Labor Markets: Lessons from the Operating Engineers Central Pension Fund</u> (Westport, Connecticut: Quorum Books, 1995).

a contract and actual practice. It is the presence of consensually agreed upon aspects of the relationship that determines liability—you could just as easily say that joint and several liability for torts is "nonconsensual" when two tortfeasors have jointly contributed to cause an injury. The whole "nonconsensual" argument is nonsense.

Finally, giving dispositive weight to the *Browning-Ferris* dissenters' concerns would result in a legal inequity. It is axiomatic that, when more than one union is certified as a joint bargaining representative, the employer may insist, with Board approval, that the unions jointly represent everyone in the bargaining unit, *Florida Tile Industries*, 130 NLRB 897, 898 fn. 3 (1961); *Mid-South Packers, Inc.*, 120 NLRB 495, 495 fn. 1 (1958). There is no hand-wringing in that context about whether it might be complicated or difficult for more than one union, each having its own structure and different interests, to come to a common bargaining position. The same standard should apply on the employer side.

The proposed rule will benefit large employers to the detriment of small employers, and will have unintended consequences for large employers as well. Included in the "wide variety of business relationships" the NPRM evinces a concern for the joint employer standard affecting, see NPRM at 46686, are a number of relationships—user-supplier, contractor-subcontractor, franchisor-franchisee, for example—that generally are between a smaller business entity and a larger business entity. In each one of the cited relationships, the employees are clearly employed by the smaller entity and the putative joint employer is the larger entity. To the extent that it is more difficult to demonstrate joint employer status, employer liabilities will end up falling solely on the small business, and the larger business will escape any responsibility. So, the consequence of the rule proposed in the NPRM will be that some large entities that might have previously shared joint and several liability with a smaller entity under the *Browning-Ferris* standard will now not share that liability, and the smaller employer's more limited resources will be required to satisfy any judgment.

This result is plain, it is purposeful, and it may well come as a surprise to the many small businesses, such as franchisees, who have been misled by their Washington trade associations into believing that the *Browning-Ferris* standard somehow represented an untoward intrusion into their contractual relationships, rather than an effort to appropriately assign responsibility between co-determining entities. In any event, the relevant aspect of this adverse impact on small businesses is that there is no attempt to quantify it in the NPRM's Regulatory Flexibility Act analysis, where the rule's impact on small businesses is required to be addressed.

By insulating large corporate entities from responsibility for their actions, the rule will undoubtedly earn the praise of its large corporate beneficiaries. The unintended consequences of the rule, however, are less likely to be greeted with the same huzzahs. It is axiomatic that workers' recoveries against their employers for injuries suffered at work are limited to workers compensation payments; the tort system is reserved for non-employer third parties who may have contributed to the injury. If the Board's proposed rule were to exert legal influence more broadly,

larger entities might find that being named as additional named insureds on a workers compensation policy might be insufficient to cover their tort liability for injury to their "non-employees." Most likely, the large entities will then redraft their agreements to require that the smaller entity indemnify them for any such losses, another transfer of responsibility on to the smaller employer.

Denver Building Trades does not support the rule proposed in the NPRM. The NPRM indicates that the proposed rule is consistent with the Supreme Court's decision in *NLRB v. Denver Building & Construction Trades*, 341 U.S. 675, 689-690 (1951), which it quotes to the effect that a contractor's exercise of supervision over a subcontractor's work does not "eliminate the status of each as an independent contractor or make the employees of one the employees of the other."

Denver Building Trades does not mandate the rule proposed in the NPRM. As Board Member McFerran points out in her NPRM dissent, the issue the Supreme Court addressed in *Denver Building Trades* was whether a contractor and a subcontractor working on a common construction site were "doing business" with each other as that term was used in then-Section 8(b)(4)(A) of the Act, or whether their work was so integrated as to preclude such a finding. To say in that context that the two entities are separate and therefore capable of doing business with each other does not in any way preclude a determination that "they can never be joint employers, *if* it is proven that the general contractor retains or exercises a sufficient degree of control over the subcontractor's workers to satisfy the common-law test of an employment relationship." NPRM, at 46690, fn. 30 (Member McFerran dissenting)(emphasis in original; citation omitted). See *Boire v. Greyhound Corporation*, 376 U.S. 473, 481 (1964)("Whether Greyhound, as the Board held, possessed sufficient control over the work of the employees to qualify as a joint employer with Floors is a question which is unaffected by any possible determination as to Floors' status as an independent contractor, since Greyhound has never suggested that the employees themselves occupy an independent contractor status. And whether Greyhound possessed sufficient indicia of control to be an 'employer' is essentially a factual question…"); *Browning-Ferris Industries of California, Inc. v. NLRB*, No. 16-1028 (D.C. Cir. December 28, 2018), sl. op. at 35.

Conclusion. "The life of the law has not been logic; it has been experience…The law embodies the story of the nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics." Oliver Wendell Holmes, Jr., The Common Law (1881), p.1. It is ironic in the extreme that the Board has chosen to exercise its long-dormant rulemaking authority on a subject—whether an employment relationship is established—as to which Congress has directed that it must apply the common law—something axiomatically evolving case by case, not static and rigid, but based on experience and the particular facts of the particular situation. The rule proposed by the Board seeks to substitute the functional equivalent of a

mathematical axiom, divorced from particular facts, for the nuanced case-by-case development that joint employer determinations require.

As the IUOE has demonstrated above, the joint employer issue is not appropriate for rulemaking, and the joint employer standard proposed in the NPRM does not comport with the common law. Moreover, the proposed standard is problematic on its own terms, as the NPRM's hypothetical examples make abundantly clear. Under these circumstances, and in light of the DC Circuit's persuasive exposition of the common law in its recent *Browning-Ferris* opinion, the Board should withdraw the proposed rule, or at the very least suspend its processing so that the DC Circuit's opinion can be taken into account. If the Board nonetheless persists in proceeding with the proposed rule, it should hold public hearings akin to those it held on the health care bargaining unit rule, where witness assertions are able to be tested by cross-examination, and the Board can assemble a solid empirical basis for an appropriate joint employer standard.

Respectfully submitted,

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